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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

12Cr. 626 (ER)

5 KEVIN BURDEN,

6 Defendant.

7 -----x

8 July 12, 2017

9 11:05 a.m.

10 Before:

11 HON. EDGARDO RAMOS,

12 District Judge

13
14 APPEARANCES

15 JOON H. KIM

16 Acting United States Attorney for
the Southern District of New York

17 BY: ROBERT B. SOBELMAN

18 Assistant United States Attorney

19 FREEMAN, NOOTER & GINSBERG

20 Attorney for Defendant

21 BY: LEE A. GINSBERG

22 ALSO PRESENT:

23 TERESA MAISANO, USPO SDNY

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1 (Case called)

2 THE DEPUTY CLERK: Counsel, please state your names
3 for the record.

4 MR. SOBELMAN: Robert Sobelman for the United States.
5 Good morning, your Honor. I am joined at counsel table by
6 Teresa Maisano of the probation office.

7 THE PROBATION OFFICER: Good morning.

8 THE COURT: Good morning.

9 MR. GINSBERG: Good morning, your Honor. Lee Ginsberg
10 appearing for Kevin Burden, who is seated next to me.

11 THE COURT: Good morning to you, Mr. Ginsberg, and
12 good morning to you, Mr. Burden.

13 This matter is on for sentencing on the finding that
14 Mr. Burden violated Specification No. 2 in the violations of
15 supervised release, as well as Specification No. 1 to which he
16 pled guilty.

17 In preparation for today's hearing, I have received
18 the government's letter dated July 5, 2017.

19 Mr. Ginsberg, I take it that you have not submitted a
20 letter.

21 MR. GINSBERG: Correct, your Honor.

22 THE COURT: So I will hear from Mr. Sobelman.

23 MR. SOBELMAN: Your Honor, the government respectfully
24 requests that the court impose the maximum sentence provided
25 under the statute of 24 months' imprisonment.

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1 The court has provided Mr. Burden many chances:

2 The court provided Mr. Burden a second chance when, a
3 few years ago, it sentenced him to a below-guidelines sentence
4 of 48 months' imprisonment when his guidelines range was 120
5 months.

6 The court provided Mr. Burden a third chance when,
7 after failing to report for approximately eight months,
8 Mr. Burden was released on bail pending sentence on
9 Specification No. 1. The court admonished the defendant that
10 he had to shape up, that he had to begin reporting, that he had
11 to comply with the terms of his supervised release, and that
12 this was a serious matter.

13 Just nine days after being admonished by the court,
14 the shooting at issue in Specification No. 2 occurred.

15 Mr. Burden has shown that he is not willing to comply
16 with court-ordered obligations and that he has repeatedly
17 abused the court's trust.

18 In addition, Mr. Burden's conduct here was egregious.
19 His failure to report aside, the shooting shows that Mr. Burden
20 continues to be a very serious danger to the community. He
21 injured the victim, who testified before your Honor, who has
22 pain every day and likely will never regain full use of his
23 leg.

24 Mr. Burden failed to report for eight months until he
25 was apprehended. He was essentially unsupervised release. And

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1 this is someone who clearly needs very close supervision, but
2 the probation office cannot do its job if Mr. Burden will not
3 live up to his obligations.

4 I also note that Mr. Burden's prior conviction, the
5 underlying conviction in this case, was for a very serious and
6 dangerous conduct, and that's the provision of a firearm that
7 was used in a robbery; and, in that specific robbery, it was
8 used to commit a murder.

9 Mr. Burden previously, even before the underlying
10 conviction, had been convicted of selling drugs, that is,
11 cocaine, in a school zone.

12 Every single crime of which Mr. Burden has been
13 convicted presents a serious danger to the community, shows
14 that he is unwilling to comply with law or court order
15 obligations, and urges that he be held in confinement for the
16 period allowed under the statute.

17 THE COURT: What is the maximum that can be imposed
18 with respect to Specification No. 1?

19 MR. SOBELMAN: I believe the maximum on both
20 specifications is 24 months.

21 THE COURT: Okay.

22 Ms. Maisano, I take it probation is also recommending
23 that I sentence him to 24 months?

24 THE PROBATION OFFICER: Yes, your Honor. We are in
25 agreement with this recommendation.

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1 THE COURT: Are you seeking to have me impose a period
2 of supervised release thereafter?

3 THE PROBATION OFFICER: No we would not recommend any
4 supervision to follow.

5 THE COURT: Okay.

6 Mr. Ginsberg, I will hear you.

7 MR. GINSBERG: Thank you, your Honor.

8 Your Honor is of course familiar with the history of
9 this case from the outset, Mr. Burden's involvement in the
10 entire case. I believe there was a trial --

11 THE COURT: There was.

12 MR. GINSBERG: -- of some of the defendants before
13 your Honor. Mr. Burden was permitted to plead guilty to a
14 lesser charge because of his limited conduct in that overall
15 case. Although the government points out today that his
16 initial conduct led to other things that then took place, he
17 was not -- he did not plead guilty to that, what he was charged
18 with initially.

19 While it is true that he did not report and your Honor
20 determined that he committed the assault while he was released
21 on supervision, I think it is fair to say that the
22 circumstances of that situation, although your Honor determined
23 by a preponderance of the evidence that he had violated
24 supervision, the circumstances surrounding that were and
25 probably are still fairly unclear.

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1 But, in any event, no matter what sentence your Honor
2 imposes, the overall issue or problem that Mr. Burden still
3 will face forever with his continuing medical condition which,
4 as your Honor recalls, first developed while he was at the MCC.

5 THE COURT: Remind me what the status is of the state
6 charge has that been dismissed, the shooting.

7 MR. GINSBERG: The government may know better than I.
8 I was advised by his attorney that the state did not intend to
9 proceed on that case.

10 THE COURT: Okay.

11 MR. GINSBERG: I don't know if it was formally
12 dismissed yet, but I have been in contact with them.

13 THE COURT: Okay.

14 MR. GINSBERG: I guess this would be characterized as
15 hearsay, but the state attorney's view was that the state
16 wasn't proceeding, not simply because the matter was before
17 your Honor on supervised release, but because the state didn't
18 believe that it necessarily could prove its case. Now, that
19 may well be, since your Honor heard the testimony, your Honor
20 may be able to determine why he made that decision. But, in
21 any event, I don't believe that that case is going to go
22 forward.

23 THE COURT: Okay.

24 MR. GINSBERG: So, getting back to Mr. Burden's
25 condition, that was a condition that was -- that developed and

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1 was first diagnosed in the MCC after a long period of time when
2 it appears that there was some lack of review of his blood
3 tests and medical conditions and it eventually led to kidney
4 failure and the dialysis. He will have to continue on that
5 forever.

6 He is, as your Honor knows and can see, he is still at
7 the hospital. The Bureau of Prisons locally, the MCC and the
8 MDC, is unable to deal with that appropriately because he needs
9 to be in the hospital at least three times a week. It is too
10 much of a burden for them to move him back and forth.

11 I think that, in some way, the fact that he violated
12 supervision so quickly that he didn't report and he wasn't
13 supervised speaks to in both directions. On one hand, he
14 shouldn't have done that, obviously, and he should have
15 reported. On the other hand, he never put himself in a
16 position where he could be properly supervised, where he could
17 have somebody speaking to him and on his case, so to speak, on
18 a regular basis, so that he would not engage in any additional
19 conduct, and maybe that's what he needs. I don't know that he
20 needs two more years in jail to figure that out. People come
21 to the realization that their criminal conduct needs to end at
22 different times in their lives and for different reasons. I
23 think that --

24 THE COURT: How old is he now?

25 THE DEFENDANT: I just turned 29 in March.

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1 THE COURT: I would recommend to the court that your
2 Honor impose a sentence of 12 months. I didn't submit any
3 papers, although I know the government did, and I reviewed
4 them. His history remains the same, and effectively he was in
5 jail almost the entire time that there would be some history to
6 report. He then violated supervised release and was back in
7 jail again.

8 The only other thing that continued to occur during
9 that period of time was his continued medical treatment. As I
10 said, that will go on. He will be certainly sent to a medical
11 facility, and I will ask your Honor, whatever sentence your
12 Honor imposes, to recommend again to the Bureau of Prisons that
13 he be sent to a medical facility, because I think that is the
14 only appropriate place to deal with his medical condition.

15 But I don't believe that your Honor needs to impose
16 the maximum sentence on him at this point, and that a 12-month
17 sentence would be sufficient.

18 THE COURT: Thank you, Mr. Ginsberg.

19 Mr. Burden, is there anything that you wanted me to
20 know?

21 THE DEFENDANT: Excuse me?

22 THE COURT: Is there anything you wanted me to know
23 before I impose sentence?

24 THE DEFENDANT: Well, if I get a brief chance to talk,
25 I would say something.

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1 THE COURT: Absolutely. Go ahead.

2 THE DEFENDANT: First and foremost, I would like to
3 apologize for being in front of you again. And I know all of
4 the circumstances it would look a certain way, but the only
5 thing I can tell you is I'm not really how these people
6 portray, and I have learned my lesson just off the fact that I
7 know how it could have went even before this situation
8 happened. So going down this road with these people when they
9 put certain things on me, I can't control that. But the only
10 thing I can say is, although I didn't report, I still haven't
11 gotten in trouble in eight months, so that's a whole eight
12 months without me back and forth in court, back and forth in
13 jail. So I can be all right. I can be good. And if you give
14 me a chance, I will be good. My kids are missing me. I'm
15 missing them, and I wouldn't do anything to put any space
16 between us. All I want to do is live out whatever rest of life
17 I got and be all right with myself and be able to be available
18 for my kids need me.

19 That's it, sir.

20 THE COURT: Thank you, Mr. Burden.

21 MR. SOBELMAN: Your Honor, I'm sorry to interrupt.
22 The probation officer --

23 THE PROBATION OFFICER: I apologize. I misspoke with
24 regard to supervised release. After viewing Officer Paige's
25 violation report, we are recommending a term of supervision to

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1 follow of three years.

2 MR. SOBELMAN: And the government respectfully agrees
3 with that recommendation.

4 THE COURT: Very well.

5 Mr. Burden, we obviously have gotten to know you
6 pretty well over the years. As Mr. Sobelman indicated, I have
7 afforded you some fairly large measures of leniency in the
8 past. While I certainly sympathize with your current medical
9 condition, it did not appear to prevent you from engaging in
10 dangerous and illegal behavior when you were out.

11 THE DEFENDANT: I hear you.

12 THE COURT: I held a hearing. I listened to the
13 witnesses and I determined that certainly the government proved
14 by a preponderance of the evidence that you shot another
15 person. You are probably very lucky that that person was not
16 hurt more seriously and did not die.

17 THE DEFENDANT: I didn't shoot him.

18 THE COURT: I consider this extremely behavior --

19 THE DEFENDANT: I did not shoot that man. No matter
20 what you got to say, I did not shoot him. You can tell him in
21 that evidence. I did not shoot that man. I can't take that,
22 sir. I just simply cannot take that. I did not shoot that
23 man.

24 THE COURT: I understand your position. That's why we
25 have hearings and put people under oath, and that's why I made

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1 the determination that I made.

2 So I do think that that is very dangerous behavior and
3 I do think that 24 months is appropriate on the facts of this
4 case, so I will sentence you to 24 months on Specification No.
5 1 and Specification No. 2, both to run concurrently, and I will
6 impose an additional three years of supervised release after
7 you are done with the same conditions as imposed the first time
8 that you were sentenced. I will recommend that you be housed
9 at a medical facility.

10 With that, Mr. Sobelman, anything further?

11 MR. SOBELMAN: Nothing further, your Honor.

12 THE COURT: Mr. Ginsberg, anything further?

13 MR. GINSBERG: Your Honor maybe this is unnecessary,
14 but because he was held at the hospital, even though he was --
15 he was still in the custody of the U.S. Marshals and the Bureau
16 of Prisons, I would just ask that your Honor make it clear on
17 the judgment and commitment that he be credited for the time
18 that he was being held in custody.

19 THE COURT: He was in custody, correct?

20 MR. GINSBERG: He was in custody, but I just don't
21 want to have any issue or any problem. I don't think it should
22 be but --

23 THE COURT: Very well. I will make sure that that
24 gets put into the J & C.

25 Let me ask you, Mr. Ginsberg, will you please assure

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1 me that you will discuss with Mr. Burden his appellate rights
2 concerning this sentence?

3 MR. GINSBERG: I will do so, your Honor.

4 THE COURT: Very well.

5 Anything further?

6 MR. GINSBERG: Nothing further, your Honor.

7 THE COURT: In that event, we are adjourned.

8 Mr. Burden, good luck to you, sir.

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